Supreme Court, U.S.
FILED

981505 MAR 18 1999

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1998

JESUS MANUEL FRIAS-MUNOZ,

Petitioner,

v.

MADELINE K. ALBRIGHT,
Secretary of State of the United States,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JESUS MANUEL FRIAS-MUNOZ
Pro Se
3405 Glendale Blvd.
Unit 105
Los Angeles, CA 90039
(323) 913-0026

25pp

QUESTION PRESENTED

Whether the doctrine of invited error, as laid out in *United States v. Cain*, 130 F. 3d 381, 383 (9th Cir. 1997) *cert. denied*, 118 S. Ct. 1333 (1998), permits a United States citizen to be denied his citizenship, and deported from the United States on the basis of illegally admitted hearsay evidence, or does the decision of this very court in *United States v. Olano*, 507 U.S. 725; 113 S. Ct. 1770; 123 L. Ed. 2d 508 guarantee that United States citizenship is protected by the Constitutionally guaranteed right to due process of law.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

STATUTORY PROVISION INVOLVED 1

STATEMENT 2

A. The Petitioner is a United States Citizen 2

B. Proceedings Below 3

REASONS FOR GRANTING THE PETITION 4

I. The Court Of Appeals' Application Of The Doctrine Of Invited Error Misinterprets The Rule Stated By This Court In *United States v. Olano* And Results In An Unconstitutional Application Of The Waiver Doctrine 5

II. The Decision Of The Court Of Appeals Is Erroneous 5

III. The Question Presented Is Important 12

CONCLUSION 15

APPENDIX A ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Dred Scott v. Sandford, 19 Howard (60 U.S.) 393; 15 L. Ed. 691 (1856) 12

Freytag v. Commissioner, 501 U.S. 868; 115 L. Ed. 2d 764; 111 S. Ct. 2631 (1991) 11

Giebelhaus v. Spindrift Yachts, 938 F.2d 962 (9th Cir. 1991) 9

Guam v. Alvarez, 763 F.2d 1036 (9th Cir. 1985) 5

In re Rainbow Magazine, Inc., 77 F.3d 278 (9th Cir. 1996) 9

Johnson v. Zerbst, 304 U.S. 458; 82 L. Ed. 1461; 58 S. Ct. 1019 (1938) 11

Marshall v. United States, 409 F.2d 925 (9th Cir. 1969) 6

Textile Mills Sec. Corp. v. Commissioner, 314 U.S. 326; 62 S. Ct. 272; 86 L. Ed. 249 (1941) 11

United States v. Cain, 130 F.3d 281 (9th Cir. 1997) ..7, 13

United States v. American-Foreign S.S. Corp., 363 U.S. 685; 80 S. Ct. 1336; 4 L. Ed. 2d 1491 (1960) 11

United States v. Baldwin, 987 F.2d 1432 (9th Cir.), cert. denied, 508 U.S. 967; 124 L. Ed. 2d 696; 113 S. Ct. 2948 (1993) 5

United States v. Butler, 74 F.3d 916 (9th Cir. 1996) 5

United States v. Freeman, 6 F.3d 586 (9th Cir. 1993) 6

TABLE OF AUTHORITIES – Continued

Page

United States v. Guthrie, 931 F.2d 564 (9th Cir. 1991) 5

United States v. Olano, 507 U.S. 725; 113 S. Ct. 1770; 123 L. Ed. 2d 508 (1993) 4, 5, 11, 13

United States v. Penagos, 823 F.2d 346 (9th Cir. 1987) 10

United States v. Perez, 116 F.3d 840 (9th Cir. 1997) (en banc) 5, 6, 7, 10, 13

United States v. Smith, 962 F.2d 923 (9th Cir. 1992) 10

United States v. Staufer, 38 F.3d 1103 (9th Cir. 1994) 5, 8

STATUTE

8 U.S.C. § 1401(a)(7) 1

LEARNED TREATISES

2 W. LaFave & J. Israel, Criminal Procedure § 11.6 (1984) 12

FEDERAL RULES

Ninth Circuit Model Criminal Jury Instruction § 3.16 8

Rule 52(b) 12

LAW REVIEW ARTICLES

Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis, *55 Texas L. Rev. 193 (1977)* 12

Orfield, The Scope of Appeal in Criminal Cases, *84 U. Pa. L. Rev. 825 (1936)* 12

TABLE OF AUTHORITIES – Continued

Page

Spritzer, Criminal Waiver, Procedural Default and the Burger Court, *126 U. Pa. L. Rev. 473 (1978)* 11

Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, *75 Mich. L. Rev. 1214 (1977)* 11

PETITION FOR A WRIT OF CERTIORARI

Mr. Jesus Manuel Frias-Munoz respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. *infra* 1a-2a) affirming the district court's judgment was filed on July 27, 1998. It was not reported. On February 17, 1999 the court of appeals denied petitioner's motion for rehearing.

JURISDICTION

The court of appeals entered its judgment on February 17, 1999. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

8 U.S.C. § 1401(a)(7) controls whether the petitioner in this case is a United States citizen.

STATEMENT

A. THE PETITIONER IS A UNITED STATES CITIZEN

Jesus Frias-Munoz, the petitioner in this case, is a citizen of the United States. Although born in Mexico, he moved to the United States when he was a teenager and has resided here since that time. He is married to a United States citizen and is the father of three children who are natural born citizens of the United States.

His father, Juan de la Cruz Frias, was a natural born citizen of the United States, having been born in Arizona in 1917. Frias-Munoz was born in Mexico in 1954 of a Mexican mother and his U.S. citizen father.

At the time of his birth, the law controlling U.S. citizenship provided that the children of U.S. citizens who were married to non-United States citizens were citizens if their U.S. citizen parent had actually resided in the United States for ten years, five of which were after attaining age 16.[1]

---

[1] See 8 U.S.C. § 1401(a)(7) "The following shall be . . . citizens of the United States at birth:. . . . a person born outside the geographic limits of the United States . . . of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person was physically present in the United States . . . for a period or periods totally not less than ten years, at least five of which were after attaining the age of fourteen years. . . . " The statute was amended to its current form in 1986 which substituted "five years, at least two" for "ten years, at least five". Had this substitution been in effect the day petitioner was born there would be no question about his citizenship.

Several years ago Frias-Munoz became involved in a transaction which dealt with the possession and distribution of illegal substances. Although no illegal substances were ever possessed or distributed, Frias-Munoz was arrested, convicted at a jury trial, and sentenced to 5 years in state prison, a sentence which he served. Currently the United States Department of Justice is attempting to deport Frias-Munoz because of his involvement in this plot.

B. PROCEEDINGS BELOW

This action was brought in United States District Court for the Central District of California, Western Division, as a writ of mandamus to compel the respondent to issue a United States passport to the petitioner. (By issuing the passport the U.S. Department of State would recognize the citizenship of Jesus Munoz-Frias.)

The petitioner attained U.S. citizenship through his father, Juan de la Cruz Frias, who was a native born U.S. citizen. Since the respondent's mother was a Mexican national and the respondent was born in Mexico, he only became a United States citizen at birth if (as mentioned above in footnote one) his United States citizen parent had actually resided in the United States for ten years, five of which occurred after the United States citizen parent had attained the age of 16.

At trial the petitioner lost largely due to an error by his then counsel who failed to object to the admission of a document into evidence. The document was an affidavit signed by Juan de la Cruz Frias which stated that although born in the United States he relocated to Mexico

while still a young boy and never returned to the United States. This document was demonstrably false, it was prejudicial to the interests of the petitioner, and it was hearsay, not within any exception to the hearsay rule, and as such had trial counsel objected to its admission it would have been excluded.

The petitioner then appealed to the United States Court of Appeals for the Ninth Circuit which held that (1) the petitioner, by his counsel, intentionally relinquished his right to object to the admission to the evidence at issue in the case; (2) because the alleged error was invited by petitioner it cannot be raised on appeal; and (3) that only forfeited rights are reviewable for plain error, while waived rights are not subject to appeal. (See Appendix A for copy of decision.)

REASONS FOR GRANTING THE PETITION

There is a significant conflict between the Ninth Circuit's opinion and this court contained in *United States v. Olano*.[2] At the district court level conflicting decisions are proliferating rapidly in the Ninth Circuit, as well as the other circuits, and the need for guidance from this court is acute. This case is a timely and rare opportunity for this court to provide that guidance, because there are systemic reasons why few of the district court decisions receive appellate review. Moreover, the decision below is clearly erroneous and the issue it addresses is important. A United States citizen should not be stripped of his

[2] 507 U.S. 725, 113 S. Ct. 1770; 123 L. Ed. 2d 508 (1993).

citizenship and deported in a trial tainted by the admission of hearsay evidence.

I. The Court Of Appeals' Application Of The Doctrine Of Invited Error Misinterprets The Rule Stated By This Court In *United States v. Olano* And Results In An Unconstitutional Application Of The Waiver Doctrine.

The level of error necessary to trigger the doctrine of invited error requires a willful decision on the part of trial counsel to waive a right. The Court of Appeals for the Ninth Circuit failed to distinguish between forfeiture, or failure to object to an erroneous decision of the trial court, and the intentional relinquishment of a right.

II. The Decision Of The Court Of Appeals Is Erroneous

Reviewing the decisional law reveals this to be true. The Court of Appeals for the Ninth Circuit has stated, in *United States v. Perez*, 116 F. 3d 840, that:

> We have held repeatedly that where the defendant himself proposes allegedly flawed jury instructions, we deny review under the invited error doctrine. See, e.g., *United States v. Butler, 74 F.3d 916, 918 n.1 (9th Cir. 1996); United States v. Staufer, 38 F.3d 1103, 1109 n.4 (9th Cir. 1994); United States v. Baldwin, 987 F.2d 1432, 1437* (9th Cir.), cert. denied, *508 U.S. 967, 124 L. Ed. 2d 696, 113 S. Ct. 2948 (1993); United States v. Guthrie, 931 F.2d 564, 567 (9th Cir. 1991).* The doctrine reflects the policy that invited errors "are less worthy of consideration than those where the defendant merely fails to object." *Guam v.*

> *Alvarez, 763 F.2d 1036, 1037 (9th Cir. 1985).* In the past, we have corrected invited errors only in extraordinary circumstances, such as "when the integrity of the judicial process itself would otherwise suffer." Id. (quoting *Marshall v. United States, 409 F.2d 925, 927 (9th Cir. 1969)*; but see, *United States v. Freeman, 6 F.3d 586, 600 (9th Cir. 1993)* (conducting a plain error review of the omission of an entrapment instruction, even though the defendant had voluntarily withdrawn such an instruction at trial). The government argues that under our invited error doctrine, we may not review the error because Cruz and Perez both proposed the faulty instructions to the court.

In this case the petitioner did not personally know of the waiver of his rights, and the waiver was not intentionally made. Rather his attorney failed, in error to make a timely objection to the admission of hearsay evidence. According to the Ninth Circuit's own decisional law this is not an "invited error" situation. The decisional law of this court is in agreement.

In order to reach the level of the doctrine of invited error it is necessary that there be more than the mere failure to object to the admission of a piece of evidence. In *Perez* both defendants submitted the flawed jury instructions. But it is clear from the record that neither the petitioner, nor the respondent, or even the court itself, was aware of the error. This fact is similar to the present case where the petitioner, through his attorney, wanted to exclude the proffered affidavit of petitioner's father, but was not aware that the document itself was hearsay not within any exception to the hearsay rule. The petitioner was not guilty of intentionally relinquishing his right to a

fair trial; rather, his attorney was guilty of negligently failing to notice that the affidavit was hearsay not covered by any exception to the hearsay rule.

In order to determine whether the doctrine of Waived Rights applies or whether the doctrine of Plain Error applies, the Court must determine whether the party himself was aware that he was waiving or affirmatively relinquishing a known right.

This is how the Ninth Circuit Court of Appeals viewed the same issue in *United States v. Cain*, 130 F.3d 281:

> The principal issue before us is how we classify the alleged error. The government argues any error was waived and thus unreviewable. See *United States v. Perez, 116 F.3d 840, 844 (9th Cir. 1997)* (en banc) (Perez). In addition, the government argues that even if not waived, any forfeited error should be reviewed under our plain error analysis. See *id.* Cain contends that plain error analysis is appropriate.
>
> In *Perez*, we held that a defendant did not waive his objection to a jury instruction when he submitted an instruction which followed the Manual of Model Criminal Jury Instructions for the Ninth Circuit, but which did not reflect the requirement of a recent case, of which both parties' counsel and the court were unaware. *Id. at 845-46.* We applied plain error analysis because there was "no evidence that [the defendants] affirmatively acted to relinquish a known right." *Id. at 845.*

This passage is particularly significant in this case. Unless there is evidence of knowledge of the fact that the

proffered evidence was hearsay, the Court should not have found, as a matter of law, that the petitioner knowingly waived his rights. The extreme penalty laid out by dint of the application of the doctrine of Waived Rights cannot apply unless the party seeking to impose this rule can show that the failure to object to the questioned item was, in fact, knowingly and willfully made.

Returning to the decision of the court:

> Here, it can be argued that Cain was not personally aware of the defect, and that would not be surprising as there is no indication he has been trained in the law. However, "we have long held that jury instructions may be waived by a defendant's attorney." *Id. at 845 n.7*, citing *United States v. Staufer, 38 F.3d 1103, 1109 n.4 (9th Cir. 1994)*.
>
> Cain's attorney's signature clearly appears on the joint request for proposed instructions. In the joint request, both he and opposing counsel wrote that they "respectfully request that the court include the attached instructions in its charge to the jury. The instructions are submitted in the sequence in which the government and defendant propose that they be read to the jury." There is no dispute that both counsel signed and filed the proposed instructions request. Both parties are, therefore, responsible for them and must bear the legal consequences.
>
> We cannot accept the proposition that the defense lawyer's signature on the jointly proposed instructions was a meaningless or perfunctory formality. Rather, Cain's attorney,

> through his signature and joint filing, represented to the court that he had read the instructions, that he had studied them, and that, to the best of his knowledge, they represented the current state of the law. When an attorney signs a jury instruction proposal, he certifies to the court, as an officer of that court, that the instructions are legally correct. In other contexts, we have recognized that an attorney's signature carries great legal consequences. See, e.g., *In re Rainbow Magazine, Inc., 77 F.3d 278, 282-83 (9th Cir. 1996)* (attorney's signature renders attorney and client sanctionable for filing bad-faith papers in bankruptcy court); *Giebelhaus v. Spindrift Yachts, 938 F.2d 962, 964-66 & n.2 (9th Cir. 1991)* (applying Rule 11 sanctions only to lawyers who actually sign pleadings and requiring actual signature, not mere typewritten name). We therefore apply the waiver analysis of Perez to action and inaction of Cain's attorney.

Again, clearly the actions of an attorney trained in law are held to a standard higher than the standard which is applied to the party in the action himself. But the standard is not absolute. Because an attorney has signed an agreement which waives an important right of his client, the decisional law does not deny said attorney the right to argue that he made a mistake. This is true in this case. Trial counsel admits that he was not aware that the proffered document was hearsay not within any exception to the hearsay rule.

The court continued:

> Like Staufer's counsel, Cain's counsel "proposed the instruction to which he now objects" and the basis for his challenge, the Ninth Circuit

> model instruction and our case law supporting it, "was already on the books." See Ninth Circuit Model Criminal Jury Instruction § 3.16; *United States v. Smith, 962 F.2d 923, 929 (9th Cir. 1992); United States v. Penagos, 823 F.2d 346, 350 (9th Cir. 1987).* Like Staufer's modified instruction, Cain's proposed jury instruction itself rebuts any claim of ignorance – Cain's instruction cited to the model instruction he now contends he ignorantly disregarded. It is no answer "merely [to assert] he did not know the instructions were flawed." *Perez, 116 F.3d at 845.*
>
> Staufer, which explicitly survives Perez, controls here. There is "evidence in the record that the defendant was aware of, i.e., knew of, the relinquished or abandoned right." *Perez, 116 F.3d at 845.* Like Staufer, Cain waived his objection to the jury instruction on possession.

But in this case there is no evidence in the record that either the counsel or the petitioner himself was aware of the mistake. In this case the record shows that the petitioner, through his attorney had the opportunity to object to the proffered evidence, but that he failed to object in a timely manner. This fact is the key to understanding this petition for certiorari. It is the failure of the Ninth Circuit Court of Appeals to recognize and to deal with this problem which causes their decision to fly in the face of accepted Ninth Circuit law, and to also contradict established Supreme Court decisions. It is necessary for the court to grant this writ of certiorari to correct the law in this case to conform with the Supreme Court's mandate that "[t]he principal utility of determinations by the Court of Appeals en banc is to enable the Court to maintain its integrity as an institution by making it possible

for a majority of its judges always to control and thereby to secure uniformity and continuity in its decisions, while enabling the court at the same time to follow the efficient and time-saving procedure of having panels of three judges hear and decide the vast majority of cases as to which no division exists within the court."[3]

In *Olano*, the Supreme Court goes to great length to distinguish between the meanings of the various doctrines at issue in this case. We can learn a great deal from reviewing what was said:

> Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." *Johnson v. Zerbst, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938)*; see, e.g., *Freytag v. Commissioner, 501 U.S. 868, 894, n. 2, 115 L. Ed. 2d 764, 111 S. Ct. 2631 (1991)* (SCALIA, J., concurring in part and concurring in judgment) (distinguishing between "waiver" and "forfeiture"); Spritzer, Criminal Waiver, Procedural Default and the Burger Court, *126 U. Pa. L. Rev. 473, 474-477 (1978)* (same); Westen, Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure, *75 Mich. L. Rev. 1214, 1214-1215 (1977)* (same). Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice

---

[3] (See *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 689-90, 80 S. Ct. 1336, 4 L. Ed. 2d 1491 (1960); see also *Textile Mills Sec. Corp., v. Commissioner*, 314 U.S. 326, 334-335, 62 S. Ct. 272, 86 L. Ed. 249 (1941).)

must be particularly informed or voluntary, all depend on the right at stake. See, e.g., 2 W. LaFave & J. Israel, Criminal Procedure § 11.6 (1984) (allocation of authority between defendant and counsel); Dix, Waiver in Criminal Procedure: A Brief for More Careful Analysis, *55 Texas L. Rev. 193 (1977)* (waivability and standards for waiver). Mere forfeiture, as opposed to waiver, does not extinguish an "error" under Rule 52(b). Although in theory it could be argued that "if the question was not presented to the trial court no error was committed by the trial court, hence there is nothing to review," Orfield, The Scope of Appeal in Criminal Cases, *84 U. Pa. L. Rev. 825, 840 (1936)*, this is not the theory that Rule 52(b) adopts. If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an "error" within the meaning of Rule 52(b) despite the absence of a timely objection.

III. The Question Presented Is Important

Over and over the facts in this case simply refuse to be categorized as falling under the doctrine of Waived Rights. "Choices" we are told must be "voluntary" or minimally "particularly informed." The standard to be applied must be based on the "right at stake." In our case the "right at stake" is the right to live in this country with one's family as an American citizen. Our citizenship is perhaps our most basic right. (See *Dred Scott v. Sandford*, 19 Howard (60 U.S.) 393. 15 L. Ed. 691 (1856).) The Supreme Court also tells us that "certain procedures" must be followed before a right may be waived. These

procedures were not followed in this case. The Panel never addresses this point in their decision.

In this case the petitioner merely failed to make a timely assertion of his rights. He did not, either personally, or through his attorney, intentionally relinquish his rights. Any review of *Olano* would reveal that he needed to do more than he did to fall under the doctrine of Waived Rights.

There is a very high standard for the party seeking a writ of certiorari by the Supreme Court to review a decision of the Ninth Circuit Court of Appeals. The standard of review is met in this case because, the decision is clearly violative of the Supreme Court decision in *Olano*. This Court has to maintain the uniformity of its decision, and to ensure that its decisions comply with its controlling decisions.

The decision of the Supreme Court in *Olano* clearly sets out standards of behavior which must be met before the courts may impose the extreme sanctions contained in the doctrine of Waived Rights. In addition to being contra to the decision in *Olano*, the decision of the Ninth Circuit Court of Appeals is violative of Ninth Circuit decisions such as *Perez* and *Cain*. The doctrine of Waived Rights is most properly applied in cases where an act is taken intentionally as a matter of trial tactics. "We will not object to the introduction of a piece of evidence in the belief that it may influence the jury to decide in our favor. And then, after losing the case, we can appeal the decision based on the evidence we intentionally let in." In this situation the doctrine of Waived Rights makes perfect

sense. A man may not murder his parents and then plead for mercy because he is an orphan.

In our case the petitioner failed to object in a timely manner because he, and his attorney, failed to recognize that a certain piece of evidence was not admissible. The act was not done as a trial tactic to win the case. This failure to act was not the result of an intent to preserve this issue as a grounds to wage an appeal of an adverse decision. The failure to object to the affidavit of Juan de la Cruz Frias was the result of the failure of the trial attorney to recognize that the proffered piece of evidence was inadmissible hearsay.

The facts in this case call out for reversal. The petitioner is a middle-aged man who is employed in a useful business, and is married to a natural born American citizen and is the father of four teenage children who need the presence of their father. He made one serious mistake and has suffered grievously for this mistake. The state has the power to destroy his life, and the lives of his innocent children, who will be denied the support of their father during perhaps the most important years of their childhood years.

The state has the power to destroy the life of the petitioner. But if you are going to do this at least give us a fair trial conducted according to the rules of evidence and not weighted down with inadmissible hearsay evidence. This is the minimal right all persons are entitled to under our system of laws.

CONCLUSION

For the foregoing reasons, petitioner prays:

1. That a writ of mandamus issue from this Court directed to the Honorable United States District Court for the Central District of California, Western Division, and to the Honorable Richard A. Paez, Judge of said Court, requiring said Honorable Richard A. Paez, to order respondent to issue petitioner a United States passport.

2. That petitioner have such additional relief and process as this Honorable Court may find be necessary and appropriate in this case.

Dated: March 17, 1999

Respectfully submitted,

Jesus Manuel Frias-Munoz
Pro Se
3405 Glendale Blvd.
Unit 105
Los Angeles, CA 90039
(323) 913-0026

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESUS MANUEL FRIAS-MUNOZ, Plaintiff-Appellant, v. MADELEINE K. ALBRIGHT, Secretary of State of the USA, Defendant-Appellee.	No. 97-56039 D.C. No. CV-95-06968-RAP MEMORANDUM* (Filed Jul. 27, 1998)

Appeal from the United States District Court
for the Central District of California
Richard A. Paez, District Judge, Presiding

Submitted July 20, 1998**

Before: HUG, Chief Judge, SCHROEDER and KOZINSKI, Circuit Judges.

Jesus Manuel Frias-Munoz appeals an evidentiary ruling by the district court in his 8 U.S.C. § 1401(g) action seeking declaratory judgment of United States citizenship. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

---

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a); 9th Cir. R. 34-4. The request for oral argument made by Frias-Munoz is therefore denied.

Frias-Munoz, by counsel, intentionally relinquished his right to object to the admission of the document at issue in this appeal. *See United States v. Cain*, 130 F.3d 381, 383 (9th Cir. 1997) (signature of attorney on joint filing carries legal consequences sufficient to support waiver), *cert. denied*, 118 S. Ct. 1333 (1998). Accordingly, because the alleged error was invited by Frias-Munoz, it cannot be raised on appeal. *See United States v. Perez*, 116 F.3d 840, 845 (9th Cir. 1997) (en banc) ("Forfeited rights are reviewable for plain error, while waived rights are not.").

AFFIRMED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – APPEALS

Case No. CV95-6968-RAP

U.S.C.C.A. Case No.: 97-56039 Date: March 4, 1999
Title: Jesus Manuel Frias-Munoz v. Madeline K. Albright, Sec. Of State

---

PRESENT: THE HONORABLE JUDGE

Courtroom Clerk Court Reporter

ATTORNEYS FOR PLAINTIFFS: ATTORNEYS FOR DEFENDANTS:

PROCEEDINGS: FILING AND SPREADING MANDATE ON THE NINTH CIRCUIT COURT OF APPEALS

__ IN COURT X IN CHAMBERS

X COUNSEL NOTIFIED (No hearing necessary)

THE COURT ORDERS that the mandate of the Ninth Circuit Court of Appeals:

X Affirming __ Remanding __ Reversing and Remanding

__ Affirming in part, reversing in part __ Dismissing Appeal

__ The record reflects that costs of the prevailing party were taxed by Ninth Circuit Court of Appeals in the amount of:

$_____ on _____.

__ Other: _____

is hereby filed and spread upon the minutes of this District Court.

__ The Case is set for further proceeding as to _____:

on _____ at _____.

__ MAKE JS-5

Initials of Deputy Clerk __

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 97-56039
CT/AG#: CV-95-06968-RAP

JESUS MANUEL FRIAS-MUNOZ

Plaintiff-Appellant

v.

MADELEINE K. ALBRIGHT, Secretary of State of the USA

Defendant-Appellee

(Filed Mar. 4, 1999)

APPEAL FROM the United States District Court for the Central District of California, Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

Filed and entered: July 27, 1998

Supreme Court, U.S.
FILED
MAY 19 1999
CLERK

(2)

No. 98-1505

In the Supreme Court of the United States

JESUS MANUEL FRIAS-MUNOZ, PETITIONER

v.

MADELEINE K. ALBRIGHT, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

SETH P. WAXMAN
Solicitor General
Counsel of Record
DAVID W. OGDEN
Acting Assistant Attorney General
LINDA S. WENDTLAND
KATHERINE M. HIKIDA
M. JOCELYN LOPEZ WRIGHT
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

2168

QUESTION PRESENTED

Whether the court of appeals properly declined to review petitioner's challenge to the admissibility of a sworn out-of-court statement on the ground that petitioner's trial counsel, who stipulated to admission of the document and relied on it at trial, intentionally waived any right to object to its admission.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Harris v. *Wall*, 48 U.S. (7 How.) 693 (1849)	7
Johnson v. *United States*, 318 U.S. 189 (1943)	8
Owens-Illinois, Inc. v. *Rapid Am. Corp. (Celotex Corp., In re)*, 124 F.3d 619 (4th Cir. 1997)	9
United States v. *Olano*, 507 U.S. 725 (1993)	6, 9, 11
Vattier v. *Hinde*, 32 U.S. (7 Pet.) 252 (1833)	7

Statutes and rules:

Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:	
§ 241(a)(2)(B), 8 U.S.C. 1251(a)(2)(B) (1994)	3
§ 301(a)(7), 8 U.S.C. 1401(a)(7) (1952)	2, 4, 5, 10
§ 301(g), 8 U.S.C. 1401(g)	2
§ 360(a), 8 U.S.C. 1503(a) (Supp. III 1997)	4
28 U.S.C. 2111	9
Fed. R. Civ. P.:	
Rule 60(b)	9
Rule 61	9
Fed. R. Crim. P. 52(b)	9
Fed. R. Evid.:	
Rule 103(d)	9
Rule 803(6)	9
Rule 803(8)(C)	9
Rule 803(16)	9
Rule 804(a)(4)	10
Rule 804(b)(1)	9

Rules—Continued: Page

Rule 804(b)(4) 9
Rule 807 10

Miscellaneous:

C. Wright & K. Graham, *Federal Practice and Procedure*:
Vol. 21 (1977 & Supp. 1999) 7
Vol. 22 (1978 & Supp. 1999) 7

In the Supreme Court of the United States

No. 98-1505

JESUS MANUEL FRIAS-MUNOZ, PETITIONER

v.

MADELEINE K. ALBRIGHT, SECRETARY OF STATE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is unpublished, but the decision is noted at 152 F.3d 925 (Table). The opinion of the district court (App., *infra*, 1a-7a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 5) was entered on July 27, 1998. A petition for rehearing was denied on February 17, 1999. The petition for a writ of certiorari was filed on March 18, 1999. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was born in Sinaloa, Mexico, on June 25, 1954. App., *infra*, 1a. Petitioner's mother held only Mexican citizenship, but his father had been born in Arizona, and was therefore also a citizen of the United States. *Id.* at 2a; E.R. 5, at Exh. 1.[1] The applicable provision of the Immigration and Nationality Act (INA) in effect at the time of petitioner's birth declared that a child born abroad to married parents, only one of whom was a citizen of the United States, would become a citizen at birth only if the citizen parent had, by the time of the birth, been "physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years." INA § 301(a)(7), 8 U.S.C. 1401(a)(7) (1952).[2]

Petitioner's father was born in Arizona on November 24, 1917, to parents who were both Mexican citizens. App., *infra*, 2a. In 1960, he appeared at the United States Consulate in Nogales, Mexico, and applied for registration as a citizen of the United States. *Ibid.* The application asserted that he was brought to Mexico in

---

[1] "E.R." refers to the Excerpts of Record filed by petitioner in the court of appeals. Because the pages in the Excerpts are not consecutively numbered, we cite documents in the Excerpts using numbers that correspond to the order in which they appear therein. "S.E.R." refers to the Supplemental Excerpts of Record filed by the government below.

[2] Unless otherwise noted, references to this provision are to the version in effect at the time of petitioner's birth. See App., *infra*, 5a. The comparable provision of current law is Section 301(g) of the Act, 8 U.S.C. 1401(g) (1994).

July 1921, when he was three years old, and that he had lived with his parents in Mexico until he married petitioner's mother, a Mexican citizen, in August 1938. *Ibid.* In response to a question on the written application asking him to list all absences from the United States "of more than 2 months' duration," he stated that he was absent from the United States, living in Mexico, from July 1921 until May 1959, and from October 27, 1959, until May 17, 1960. *Ibid.*; S.E.R. 43. The consul's opinion, which is attached to the application and was written after "a close questioning" of the applicant (S.E.R. 47), similarly relates that, after being brought to Mexico by his parents, petitioner's father had "lived [t]here continuously to date, with the exception of a five months visit to the United States in 1959." *Ibid.* During that time he and his wife had eight children, all of whom were born in Mexico. App., *infra*, 3a.

Petitioner's father's application for registration of citizenship was approved in 1960. App., *infra*, 3a. In September 1966, petitioner obtained an immigrant visa from the United States Consulate in Tijuana, Mexico. He entered the United States lawfully as a permanent resident alien, on the basis of his status as the child of a citizen parent. *Ibid.*

In February 1989, a California court convicted petitioner on state felony charges involving the sale of cocaine. S.E.R. 109-110. Petitioner was sentenced to ten years' imprisonment, and he served five years of that sentence. S.E.R. 110. In March 1994, when petitioner was released from prison, the INS initiated deportation proceedings against him on the basis of his controlled-substance conviction. S.E.R. 108-110; see generally former INA § 241(a)(2)(B), 8 U.S.C. 1251(a)(2)(B) (1994).

2. In November 1995, petitioner applied to the Secretary of State for the issuance of a United States passport, claiming that he became a citizen, under former Section 301(a)(7), when he was born abroad to a citizen father. App., *infra*, 3a; E.R. 5, at Exh. 1; S.E.R. 5 (¶ 4), 52. The Secretary denied petitioner's application on the ground that his citizen father had not, at the time of petitioner's birth, been physically present in the United States for the time required under that Section for the transmission of citizenship. App., *infra*, 3a-4a; S.E.R. 52-53. In reaching that conclusion, the Secretary relied on the factual recitations in petitioner's father's application for registration as a United States citizen. S.E.R. 52.

Petitioner filed this action under INA § 360(a), 8 U.S.C. 1503(a) (Supp. III 1997), challenging the Secretary's refusal to issue him a passport, and seeking a judicial declaration that he is a citizen of the United States. See S.E.R. 4-5. In February 1997, counsel for petitioner and counsel for the government signed and filed with the district court a Joint Exhibit List. S.E.R. 7. That list included, as Exhibit 18 for petitioner and as Exhibit 101 for the government, the application for registration as a United States citizen filed by petitioner's father in 1960. S.E.R. 9-10. It also included, directly above the signatures of counsel for both parties, the statement: "The parties hereby agree that the following exhibits should be admitted into evidence at trial without objection: Exhibits Nos. 1, 2, 4, 13, 14, 18, 19, 20, and 101 through 120." S.E.R. 12.

In March 1997, the district court held a pre-trial conference and filed a Pre-Trial Conference Order, which the parties had jointly drafted and previously lodged with the court. S.E.R. 16-35. That order reflected and approved the parties' agreement that with

the exception of certain exhibits not at issue here, to which the government preserved objections, all exhibits set forth in the Joint Exhibit List were to be admitted without objection. S.E.R. 34. The court thereafter conducted a two-day trial, during which petitioner's counsel presented a number of witnesses in an effort to demonstrate that petitioner's father had satisfied Section 301(a)(7)'s physical presence requirement before petitioner's birth in 1954. Petitioner's counsel further relied on factual assertions in the 1960 application for registration of citizenship to demonstrate that petitioner's father had been physically present in the United States for almost four years immediately after he was born, before his parents took him back to Mexico in 1921. See S.E.R. 126-128.

3. After trial, the district court found in favor of the government. App., *infra*, 1a-7a. The court found that the evidence established that petitioner's father was physically present in the United States for forty-three months after his birth; for nine months in 1942, as an employee of the South [*sic*] Pacific Company; for twelve months in 1944, as an employee of the North [*sic*] Pacific Company; and for about twelve months from July 1953 through June 25, 1954. *Id.* at 4a, 6a. Because those periods, taken together, were insufficient to demonstrate physical presence in the United States for at least ten years, five of them after the age of fourteen, before the date of petitioner's birth, the court concluded that petitioner did not acquire United States citizenship from his father under Section 301(a)(7). *Id.* at 1a-2a, 6a-7a.

The court of appeals affirmed. Pet. App. 1-2. On appeal, petitioner challenged only the admission of his father's 1960 application for registration of citizenship, claiming that it was inadmissible hearsay, and that if it

had been excluded he would have prevailed at trial. Pet. C.A. Br. 1, 17. The court of appeals declined to consider petitioner's evidentiary claim, holding that, by stipulating to the admission of the application at trial, he had "intentionally relinquished his right to object to the admission of the document." Pet. App. 2. Because any evidentiary error had been invited by petitioner, it could not be raised as a ground for reversal on appeal. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 5-14) that the court of appeals erred in concluding that he waived any right to object to the admission of the factual assertions in his father's application for registration of citizenship, when instead he merely "failed to object in a timely manner because he, and his attorney, failed to recognize" that the sworn statements in the application were "inadmissible hearsay" (Pet. 14). He argues that the court of appeals should have applied a "plain error" standard drawn from *United States* v. *Olano*, 507 U.S. 725 (1993), and on that basis should have vacated the district court's judgment and remanded for retrial. None of petitioner's arguments has merit.

1. The court of appeals correctly concluded that petitioner, through his trial counsel, "intentionally relinquished" any right to object to admission of the factual statements in petitioner's father's application for registration of citizenship. Pet. App. 2. In the Joint Exhibit List filed before trial, petitioner's counsel explicitly agreed that the application "should be admitted into evidence at trial without objection." This Court has long recognized that parties may enter into such stipulations, and that courts may enforce them without further inquiry into whether the evidence in

question would otherwise be admissible. See *Harris* v. *Wall*, 48 U.S. (7 How.) 693, 695-696 (1849) (reporter's statement of relevant facts); *id.* at 705 (Court's opinion) ("When parties, with a full knowledge of the contents of a deposition, agree that it shall be read to the jury on the trial of the cause, they have no right to complain of the court for *not* excluding from the consideration of the jury the very matter which they themselves have agreed should be read to them."); *Vattier* v. *Hinde*, 32 U.S. (7 Pet.) 252, 265- 266 (1833) (Marshall, C.J.); 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5039, at 200 & n.7, 206 & n.26 (1977 & Supp. 1999) (Wright & Graham), and cases there cited; see also 22 Wright & Graham § 5194 (1978 & Supp. 1999) (discussing stipulations in context of determining relevance). In this case, moreover, petitioner's counsel not only agreed to the admission of the application as a government exhibit; he obtained the government's reciprocal agreement that the same document would be admitted without *government* objection as one of *petitioner's* exhibits. S.E.R. 12; see p. 4, *supra*; cf. 21 Wright & Graham § 5039, at 202-204 & n.18.1.

The Pre-Trial Order, drafted jointly by both parties' counsel, also dealt expressly with the application. That Order, which detailed the factual representations made by petitioner's father as part of the application (S.E.R. 17-18), specifically acknowledged that petitioner was *not* contending that the statements at issue "were not made, or that the Consul in any way inaccurately or improperly recorded those statements" (S.E.R. 24). The Order reserved, instead, petitioner's right to present "relevant evidence to support contradictory claims * * * as to the truth of the matter therein stated." S.E.R. 25. Petitioner's counsel did present such "contradictory" evidence at trial, and the district court

credited some of that evidence when it found that petitioner's father had, in fact, been physically present in the United States for three periods not reflected in the registration application. E.R. 4, at 4-6; see p. 5, *supra*. To prove physical presence for the longest period recognized by the district court, however, both petitioner and the court relied on the uncontradicted assertion, in the registration application, that petitioner's father had remained in the United States from the time of his birth until his parents took him back to Mexico when he was almost four years old. See S.E.R. 126-128; App., *infra*, 2a-6a.

In short, petitioner's trial counsel did not "fail[] to object" (Pet. 14) to admission of the statements in the father's application. He actively sought, and obtained, both admission of those statements as part of his case, and selective reliance by the fact-finder on the truth of some, but not all, of those statements. As the court of appeals properly held (Pet. App. 2), counsel's decision to pursue that trial strategy precludes consideration at this juncture of petitioner's belated argument that the statements in his father's application should have been excluded in their entirety. Cf. *Johnson* v. *United States*, 318 U.S. 189, 201 (1943) ("We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him.").

2. Even if petitioner's present claim were reviewed under the standard for which he contends, he could not prevail. Under *Olano*, an appellate court should notice and correct a forfeited error in the proceedings below only if the error is "plain," "affect[s] substantial rights," and "seriously affect[s] the fairness, integrity or public

reputation of judicial proceedings." 507 U.S. at 731-737.[3]

In this case it is far from "plain" that the district court committed any error at all. First, as we have explained (see pp. 6-7, *supra*), the parties stipulated to the admission of the statements in question, and the district court was not required to consider the question of admissibility any further. Moreover, although petitioner asserts (Pet. 4) that the statements in his father's registration application were "not within any exception to the hearsay rule," he makes no argument in support of that contention. Nor could any such argument show "plain" error, given the variety of different hearsay exceptions under which the father's statements would likely have been held to be admissible, had the issue been presented to the district court. See Fed. R. Evid. 804(b)(4) (statements of family history), 803(16) (statements in documents more than 20 years old); see also Fed. R. Evid. 804(b)(1) (former testimony), 803(8)(C) (findings of government investigations), 803(6) (busi-

---

[3] *Olano* was a criminal case, and construed Rule 52(b) of the Federal Rules of Criminal Procedure. The Federal Rules of Civil Procedure do not contain a general "plain error" rule, although there is such a provision in the Federal Rules of Evidence. Fed. R. Evid. 103(d); compare 28 U.S.C. 2111 (harmless error); Fed. R. Civ. P. 60(b) (motions for relief from judgment), 61 (harmless error). Some courts of appeals have applied *Olano* in the civil context; and the standard in civil cases should, in any event, be no *less* stringent. See, *e.g.*, *Owens-Illinois, Inc.* v. *Rapid Am. Corp.* (*In re Celotex Corp.*), 124 F.3d 619, 631 (4th Cir. 1997) (citing cases). This case presents no issue concerning the limits of plain-error review in civil cases, because petitioner cannot in any event satisfy the standards articulated in *Olano*.

ness records), 807 (statements with "equivalent circumstantial guarantees of trustworthiness").[4]

Even if, however, petitioner's father's statements would have been excluded on timely objection, and petitioner should be excused from having failed to object, any resulting error was harmless in this case. Petitioner had the burden of showing that his father satisfied the physical presence requirements of former Section 301(a)(7). After considering all the admitted evidence, including the testimony of petitioner's relatives and other documentary evidence introduced by petitioner, the district court found that petitioner's father had been physically present in the United States not only for 43 months immediately following his (the father's) birth, but also for later periods, before petitioner's birth, totaling some 33 additional months. Given that the latter finding contradicts the statements made by petitioner's father in his registration application, the court was plainly willing to credit petitioner's other evidence where appropriate. Excluding all statements in the application accordingly would not have assisted petitioner; to the contrary, it would have removed a primary evidentiary support, relied on by petitioner's counsel, for the single finding most favorable to petitioner—his father's 43-month presence in this country immediately following his birth.

Finally, exclusion of the statements at issue is not necessary to safeguard the integrity or public reputation of judicial proceedings. Indeed, rather the reverse is true. We agree with petitioner (Pet. 12) that accu-

---

[4] Petitioner's father died before petitioner applied for a passport, and he was therefore not available to testify at trial. See S.E.R. 23 (designating copy of death certificate as petitioner's Exhibit 14); Fed. R. Evid. 804(a)(4).

rate determinations of citizenship are a matter of the utmost importance. Petitioner has, however, been afforded a full and fair opportunity to present all available evidence that his father satisfied the requirements established by Congress for transmitting United States citizenship to a child born abroad. It is requiring retrial of that issue *without* admission of the evidence at issue here that would tend to impugn "the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
LINDA S. WENDTLAND
KATHERINE M. HIKIDA
M. JOCELYN LOPEZ WRIGHT
Attorneys

MAY 1999

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

No. CV 95-6968-RAP(AJWx)

JESUS MANUEL FRIAS-MUNOZ, PLAINTIFF

v.

MADELEINE ALBRIGHT, SECRETARY OF
STATE OF THE UNITED STATES OF AMERICA,
DEFENDANT

[Filed: May 5, 1997]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter was tried to this Court on April 22 and April 23, 1997. The court having considered the evidence adduced at trial, and the arguments of the parties, and having judged the credibility of the witnesses and being fully advised, now makes the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

1. Plaintiff was born in Sinaloa, Mexico on June 25, 1954. Plaintiff has not met the statutory requirements under 8 U.S.C. § 1401(a)(7) to establish a claim to United States citizenship as a person born outside the United States to a United States citizen father.

2. Plaintiff's father, Juan de la Cruz Frias, was born in Arizona on November 24, 1917, to Mexican citizen parents, Raymundo Frias and Belen Gomez.

3. On May 18, 1960, plaintiff's father applied for registration as a United States citizen at the United States Consulate in Nogales, Mexico.

4. In his application for registration, plaintiff's father stated under oath before a consular officer that the following was true: (1) plaintiff's father had been brought to Mexico by his parents in July, 1921, when plaintiff's father was three years old; (2) plaintiff's father had lived with his parents in Navolato, Mexico, until he married Andrea Munoz, a Mexican citizen on August 27, 1938; and (3) except for a five-month visit in 1959, plaintiff's father lived in Mexico from July, 1921, to May, 1960, and was absent from the United States during this period of time.

5. As evidence of United States citizenship, plaintiff's father submitted to the consular officer a Certificate of Baptism issued on August 9, 1945, stating that plaintiff's father was born on November 24, 1917, in Mayer, Arizona, and baptized on January 1, 1918. Plaintiff's father also submitted an Arizona Delayed Birth Certificate filed on March 8, 1954, which was based on the submission of the following: (1) Certificate of Baptism issued in 1945; (2) affidavit of uncle, Jose G. Gomez, dated August 30, 1949; (3) copy of a Kenosha County, Wisconsin, Court Order filed on March 10, 1950; and (4) copy of plaintiff's grandparents' 1938 marriage certificate.

6. Plaintiff's father also stated under oath in his application for registration that he presented his parents' affidavit of March 24, 1960, which indicated that his parents left the United States in 1921. Plaintiff's father stated under oath that he and his wife had eight children, all of whom were born in Mexico. Plaintiff's father's application for registration as a United States citizen was approved in 1960.

7. On September 22, 1966, the United States Consulate at Tijuana, Mexico, issued plaintiff an Immigrant Visa and Alien Registration to enter the United States as a Mexican citizen child of a United States citizen. On September 23, 1966, plaintiff was admitted to the United States by the Immigration and Naturalization Service as an alien child of a United States citizen parent.

8. Plaintiff filed an application for a United States passport with the Los Angeles Passport Agency on November 27, 1995. Plaintiff submitted the following with his passport application: (1) plaintiff's father's Arizona Delayed Birth Certificate, issued on April 26, 1994; (2) plaintiff's parents' marriage certificate; (3) plaintiff's birth certificate; (4) 1978 death certificate; and (5) three affidavits, each dated September 21, 1995, from relatives stating that plaintiff's father allegedly lived and worked in Arizona from approximately 1940 until 1955 when he moved to California.

9. Defendant's Passport Agency at Los Angeles denied plaintiff's application for a United States passport on December 11, 1995, based on plaintiff's father's sworn statement in 1960 that he had been brought to Mexico by his parents at age three and had

lived there continuously until he applied for registration as a United States citizen, except for a five-month visit to the United States in 1959.

10. Plaintiff father was physically present in the United States from November 24, 1917, to July, 1921, for a period of forty-three months. Plaintiff's father was also physically present in the United States for nine months in 1942, when he worked for the South Pacific Company, and one year in 1944, when he worked for the North Pacific Company, for a period totaling twenty-one months. Plaintiff's father was further physically present in the United States from July 1953 through June 25, 1954.

11. Plaintiff failed to provide evidence to support his contention that plaintiff's father was physically present in the United States for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years.

12. Any of the foregoing findings of fact deemed to be conclusions of law are hereby incorporated into the conclusions of law.

II. CONCLUSIONS OF LAW

1. United States citizenship is acquired only by: (1) birth or naturalization in the United States under the Fourteenth Amendment to the United States Constitution; or (2) statute enacted by Congress pursuant to its power over naturalization set forth in Art. I, § 8, Cl. 4 of the United States Constitution. *Rogers v. Bellei*, 401 U.S. 815, 827-31 (1971); *see United States v. Wong Kim Ark*, 169 U.S. 649, 673-74 (1898). Congress can

impose conditions on non-Fourteenth Amendment citizenship for persons born outside the United States, such as residence requirements. *Runnett v. Shultz*, 901 F.2d 782, 786 (9th Cir. 1990).

2. The law under which a person born abroad to a United States citizen parent may acquire United States citizenship is the statute that was in effect at the time of the child's birth. *Runnett v. Schultz*, 901 F.2d 782, 783 (9th Cir. 1990). The provisions of 8 U.S.C. § 1401(a)(7), which were in effect at the time of plaintiff's birth, provide that a person born abroad to one United States citizen parent and one alien parent acquires United States citizenship at birth if the citizen parent was physically present in the United States or its outlying possessions prior to the birth of the child for a period or periods totaling not less than ten years; at least five of which were after attaining the age of fourteen years.

3. Plaintiff has the burden of proving his claim of United States citizenship by a fair preponderance of the evidence. *Lim v. Mitchell*, 431 F.2d 197, 199 (9th Cir. 1970); *Gay v. Rusk*, 290 F.2d 630, 631 (9th Cir. 1961). The applicable citizenship law is 8 U.S.C. § 1401(a)(7), pursuant to which plaintiff must prove that prior to plaintiff's birth in Mexico on June 25, 1954, his United States citizen father had been physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, five of which were after attaining the age of fourteen years. *Runnett*, 901 F.2d at 783; *United States v. Ortiz-Diaz*, 849 F. Supp. 734, 740 (E.D. Cal. 1994).

4. The Ninth Circuit Court of Appeals has stated that only objective facts and not subjective intent are considered when applying the statutory requirements for United States citizenship for a person born outside the United States. *Runnett*, 901 F.2d at 784-85. Substantive evidence, furthermore, cannot be based upon an inference drawn from facts which are uncertain or speculative which raise only a conjecture of possibility. *Woods v. United States*, 724 F.2d 1444, 1451 (9th Cir. 1984).

5. The objective, documentary evidence in this action does not show that plaintiff's father was physically present in the United States for a total of ten years, five after the age of fourteen, prior to plaintiff's birth on June 25, 1954. The evidence shows that plaintiff's father was physically present in the United States from November 24, 1917 to July, 1921 (from plaintiff's father's birth to age three). The documentary evidence offered by plaintiff to support his relatives' testimony shows that before plaintiff's birth, plaintiff's father was working in the United States from about July-September, 1953 to April-June 1954. The documentary evidence does not support a claim that plaintiff's father's visits amounted to a total of ten years of physical presence in the United States prior to plaintiff's birth on June 25, 1954. Nor does the evidence support an inference, as argued by plaintiff's counsel, that plaintiff's father was physically present in the United States for the years required by 8 U.S.C. § 1401(a)(7). Plaintiff, therefore, is not a United States citizen pursuant to 8 U.S.C. § 1401(a)(7). *Rodriguez-Romero v. INS*, 434 F.2d 1022, 1023-24 (9th Cir. 1970); *Ortiz-Diaz*, 849 F.Supp. at 740; *see Matter of Lee*, 11 I&N Dec. 34, 36 (BIA 1965).

6. Based on the foregoing, plaintiff's father's visits to the United States do not total ten years as required under 8 U.S.C. § 1401(a)(7). Plaintiff has not established his claim of United States citizenship by a fair preponderance of the evidence. *See Lim v. Mitchell*, 431 F.2d 197, 199 (9th Cir. 1970); *Gay v. Rusk*, 290 F.2d 630, 631 (9th Cir. 1961). Plaintiff, therefore, has failed to state a claim for declaratory judgment of United States citizenship pursuant to 8 U.S.C. § 1401(a)(7). Plaintiff has failed to produce evidence that would support a judgment in his favor.

7. Any of the foregoing conclusions of law deemed to be findings of fact are hereby incorporated into the findings of fact.

DATED: May 2, 1997.

/s/ RICHARD A. PAEZ
RICHARD A. PAEZ
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JUN 11 1999
CLERK

(3)

No. 98-1505

In The

Supreme Court of the United States

JESUS MANUEL FRIAS-MUNOZ,

Petitioner,

v.

MADELEINE K. ALBRIGHT,
SECRETARY OF STATE OF THE UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

Jesus Manuel Frias-Munoz
Pro Se
3405 Glendale Blvd.
Suite 105
Los Angeles, CA 90039
(323) 913-0026

8pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

STATEMENT OF FAMILY HISTORY 2

STATEMENTS IN DOCUMENTS MORE THAN 20 YEARS OLD 3

FORMER TESTIMONY 3

FINDINGS OF GOVERNMENT INVESTIGATIONS 3

BUSINESS RECORDS 4

STATEMENTS WITH "EQUIVALENT CIRCUMSTANTIAL GUARANTEES OF TRUSTWORTHINESS" 4

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

United States v. Cain, 130 F.3d 381 (9th Cir. 1997) *cert. denied*, 118 S. Ct. 1333 (1998) 1

United States v. Olano, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) 1

FEDERAL RULES OF EVIDENCE

803(6) 4

803(8)(C) 3

803(16) 3

804(b)(1) 3

804(b)(4) 2

807 4

ARGUMENT

If you can define the question you can control the outcome of any issue. This is what the federal government is attempting to do in this case. This is evident if one reviews the question of this case as presented by both sides:

The question is the case as presented by the petitioner:

Whether the doctrine of invited error, as laid out in *United States v. Cain*, 130 F.3d 381, 383 (9th Cir. 1997) *cert. denied*, 118 S. Ct. 1333 (1998), permits a United States citizen to be denied his citizenship, and deported from the United States on the basis of illegally admitted hearsay evidence, or does the decision of this very court in *United States v. Olano*, 507 U.S. 725, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) guarantee that United States citizenship is protected by the Constitutionally guaranteed right to due process of law.

The question in this case as presented by the respondent:

Whether the court of appeals properly declined to review petitioner's challenge to the admissibility of a sworn out-of-court statement on the ground that petitioner's trial counsel, who stipulated to admission of the document and relied on it at trial, intentionally waived any right to object to its admission. The question in this case is not whether trial counsel, for tactical reasons, chose to not object to the admission of an item of evidence which he did not realize was inadmissible hearsay. The question is whether we will strip a United States citizen of his rights in a trial corrupted by the admission of inadmissible hearsay.

The sworn out-of-court statement of Juan de la Cruz Frias was inadmissible hearsay, and as such it should have been excluded from evidence at trial. The fact that in previous pleadings the petitioner merely stated that it was hearsay and did not offer argument in support of this proposition is irrelevant. A party cannot be forced to prove a negative. Once petitioner established that the sworn out-of-court statement was hearsay it was the duty of the party offering the statement to demonstrate that it was covered by an exception to the hearsay rule.

At page 9 of their brief in opposition the government attempts to demonstrate that the sworn out-of-court statement is covered by an exception to the hearsay rule. Looking at the exceptions cited by the government, let us take a close look at the exceptions to the hearsay rule cited by the government.

STATEMENT OF FAMILY HISTORY

This exception is laid out in Fed. R. Evid. 804(b)(4). But for it to be a statement of family history it must deal with affairs of the family. A statement of family history must deal with marriages, deaths or births. The proffered statement only dealt with the residence of Juan Frias. Family history specifically deals with marriages and the birth of children. This exception is simply irrelevant in this context.

STATEMENTS IN DOCUMENTS MORE THAN 20 YEARS OLD

This exception is found at Fed. R. Evid. 803(16). For this exception to apply the hearsay document must be found where documents of its nature are regularly stored. In other words, if the document dealt with fiscal matters it must have been discovered in a place where fiscal documents are generally stored. Since this document dealt with the residences of Juan Frias for it to be covered by the ancient document exception to the hearsay rule it needed to be found where similar documents are regularly stored. This clearly was not the case, and as such this exception to the hearsay rule does not apply.

FORMER TESTIMONY

For this exception, codified at Fed. R. Evid. 804(b)(1) to apply the proffered evidence must have been subject to cross examination. This did not occur here. The reason former testimony is permitted into evidence is because it is subject to cross examination, and as such is more believable. In this case the statements, although made under oath, were not subject to cross examination and there is no policy reason to suspect that the statements are true.

FINDINGS OF GOVERNMENT INVESTIGATIONS

This exception, codified at Fed. R. Evid. 803(8)(C), requires that there be a government investigation. There was no investigation of the hearsay statements in this

case. Juan Frias made the statements, the government wrote them down, and the government used the statements for its own purposes. This exception simply does not and cannot apply based on the facts in this case.

BUSINESS RECORDS

This exception, codified at Fed. R. Evid. 803(6) only applies to records kept in the regular course of business. It would best apply in a case where the issue under contention was the time a truck arrived at a terminal, and the terminal recorded, as part of its regular business the times that trucks arrived.

Additionally, the business records exception only applies to business situations. Governmental operations are not covered by this exception to the hearsay rule. As a consequence the respondent cannot claim that this exception resolves the hearsay problem in this case.

STATEMENTS WITH "EQUIVALENT CIRCUMSTANTIAL GUARANTEES OF TRUSTWORTHINESS"

This exception, codified at Fed. R. Evid. 807 is a general catchall which only applies when no other exception applies and there are serious reasons to admit the hearsay. But in this case there exists no serious reason to admit the statements of Juan Frias. There is simply no reason to believe that he was telling the truth when he made his statement. There are many reasons to believe that he may have been lying.

The first reason that he may have been lying is because he thought, incorrectly, that if he admitted to having resided in the United States he would have had to prove that he resided in the United States. Remember that Juan Frias was a farm worker who, as far as we know, had no formal education. He may very well have held ideas which were wrong.

The hearsay statement issued by Juan Frias was made as part of an application by Juan Frias for admission into a farm workers program. His aim was to gain admission to the program. If he erroneously believed that significant periods of time in the United States would cause his admission to the program to be denied he had a motive to lie. Note that motive even if based on a mistake of fact is still motive.

This case calls out for remedy. An American citizen has been denied his citizenship based upon a flawed trial. It is fundamental under our system of laws that a party being denied his rights be permitted to face, confront and cross examine the witnesses against him.

In this case the main witness against Jesus Munoz-Frias, Juan Frias took his secrets to the grave with him. Being unable to cross examine Juan Frias the petitioner is denied his one chance to prove that he is a United States citizen. This violates all standards of fairness.

Rules exist for a purpose. We exclude hearsay not make trials complex or to create grounds for endless appeals. We exclude hearsay because experience has taught us that hearsay evidence is unreliable. Only if a witness is subject to cross examination can we even begin to be sure about his veracity.

Our system of law has created a hearsay rule which is subject to a limited number of exceptions. If a piece of evidence is hearsay it is excluded unless there exist clear exceptions which permit it to be admitted. These exceptions have been codified in the Federal Rules of Evidence, and none of these exceptions are controlling in this case. Absent an exception to the hearsay rule the out-of-court statements of Juan de la Cruz Frias should have been excluded at trial below. Since they were not the decision below was fatally flawed and this court has no choice other than to reverse the court below and order a new trial.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Jesus Manuel Frias-Munoz
Pro Se
3405 Glendale Blvd.
Suite 105
Los Angeles, CA 90039
(323) 913-0026

June 1999